Supreme Court, U.S.
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No. 00-1924

In the Supreme Court of the United States

B.J.M.,

Petitioner,

v.

FAMILY OPTIONS,
E.R.B. and P.L.B., h/w,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

RESPONDENT'S BRIEF IN OPPOSITION

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CORPORATE DISCLOSURE

Respondent Family Options is not a publicly traded company nor does it have any parent or subsidiary companies.

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STATEMENT OF THE CASE

Petitioner's inaccuracies and misstatements of fact are unsupported by the credible evidence, the opinion of the Trial Court and the opinion of the Appellate Division. Accordingly, Respondent offers the following as an accurate account of the facts in this case.

A. CREDIBILITY OF WITNESSES

The Trial Court was in a position to assess the credibility of the witnesses who testified. Of the four major fact witnesses, Petitioner, Petitioner's mother, Ms. Christine Letizia, and Ms. Diane Propert, the Court found all to be "personally and heavily invested in the outcome of the case". Petitioner's Appendix, hereinafter referred to as "PA" 39a. In light of this, the Trial Court did not adhere to any one witness' recollection of the facts. Rather, the Trial Court "considered the parties' testimony, their biases and the consistency of their testimony, as well as how their testimony squared with known objective facts". PA 40a. After carefully weighing and considering the testimony of each, the Trial Court found Petitioner's claim that she signed the surrender and consent to adoption documents without reading any of them to be "incredible". PA 75a-76a. The Appellate Division, while acknowledging general deference to a lower court's findings of fact, determined that the Trial Court's "findings on this point appear to be eminently supported by the record". PA 10a. Accordingly, Petitioner lacked credibility with the Trial Court.

B. FINDINGS OF FACT

Petitioner was not suffering from a mental illness or psychological malady that would inhibit her from being able

to make an informed and voluntary decision to place her baby for adoption. Petitioner's family physician never diagnosed her as being depressed or in need of psychological counseling. PA 46a. The professionals at the hospital where Petitioner gave birth did not diagnose any psychological disorder in Petitioner, pre-existing or precipitated by the pregnancy, nor did they see a need to order psychological counseling for her. PA 7a; PA 55a.

Petitioner relies heavily upon portions of the testimony of a nurse, Gerry McKnight-Luddy, in supporting her depression allegation. Nurse McKnight-Luddy is a fact witness with very limited exposure to the entire matter. Petitioner conveniently overlooks other portions of Nurse McKnight-Luddy's testimony that bear upon these issues. Nurse McKnight-Luddy testified that after the delivery, Petitioner's demeanor changed from crying jags into a much calmer state. T4:190-11 to 16[1]. Another nurse, Larissa Minchin, Petitioner's attending nurse on the day after delivery, testified that Petitioner was calm during her shift. Nurse Minchin also testified that, during a conversation, Petitioner informed Nurse Minchin that she would be unable to give the baby what she needs and that she would proceed with the adoption for the sake of the baby. T4:208-1 to 5; T4:208-11 to 13.

Petitioner, though feeling the effects of the momentous decision she made, exercised her own will, free from any psychological malady, from the time she learned of her pregnancy to the time that she knowingly and voluntarily signed the surrender and consent to adoption. This was a

[1] T4:190-11 to 16 refers to the Trial Court transcript lodged with the Appellate Division of the Superior Court of New Jersey.

choice that she made after carefully and thoughtfully considering her options. After the birth of the baby, Petitioner exercised strong decisiveness when she dismissed the first couple she had approved to adopt her baby. PA 56a. Additionally, Petitioner returned to work and school immediately after giving birth. PA 89a.

Regarding Petitioner's inclinations toward parenting or lack thereof, the Trial Court, as fact finder, concluded that "while [Petitioner] complains that the agency was primarily focused on adoption, [Petitioner's] doctor referred her to the agency for that purpose, and for the first five weeks of the relationship, [Petitioner] expressed no interest whatsoever in parenting". PA 83a.

Petitioner's so-called attempt to develop a parenting plan was pursued with little vigor by Petitioner. As the Trial Court found, Petitioner understood that she could call upon a baby-sitter or try foster care or simply bring the baby home if parenting was a serious consideration. PA 83a. Petitioner testified that she was aware she could take the baby home with her at any time. T2:191-22 to 192-1. The Trial Court also noted that "[Petitioner] made it very clear that she was not willing, even for a short period of time, to put off her personal school goals and parent the child herself". PA 92a-93a. Further, the Appellate Division found that "[Petitioner] was considering parenting [the baby], but no real preparations were undertaken and no family members were available to assist with parenting...and [Petitioner] continued to consider prospective adopting parents". PA 4a. Parenting was an option that was explored. It was simply not the option the Petitioner chose.

Petitioner claims that Respondent Family Options subjected her to immense pressure to move forward with

adoption. As both the Trial Court and Appellate Court found, "the pressure by [Family Options] was not to force an adoption, but rather, to pressure [Petitioner] into making a decision about her child's future". PA 8a; PA 91a-92a. Further, even though Petitioner was at times "confused... and conflicted", she was not under "overwhelming pressure... sufficient to force her to make a decision that she would not otherwise have made". PA 8a-9a.

Petitioner made a choice to voluntarily relinquish her parental rights to her baby. It was an informed decision, as Petitioner had the benefit of knowing and understanding that she had other options to adoption. Petitioner testified at trial that it was after placing the baby with the adoptive parents that she felt the placement was a "mistake". T2:211-13 to 20. Simply stated, Petitioner is now unhappy with her choice.

Petitioner is wholly inaccurate in stating that Ms. Letizia informed Petitioner that daycare for newborns did not exist. The Trial Court found that, while Ms. Letizia was unfamiliar with the availability of daycare for newborn infants in the county where Petitioner resides and stated such, she verbally referred Petitioner to that county's Office of the Department of Youth and Family Services and the Board of Social Services. PA 80a-82a; T7:92-15 to T7:93-8. Petitioner's mother, on her own initiative, checked the local telephone directory and was unable to locate daycare for newborns in their area. T2:188-6 to 20. Additionally, Petitioner was aware that babysitting was another option. PA 82a; T4:53-16 to 21.

Petitioner is inaccurate in her depiction of Family Options' actions in continuing to care for the baby as a "defiant refusal" to abide by Petitioner's wishes. Petitioner's

Brief, hereinafter referred to as "PB", 9. Petitioner had been informed that Family Options could only provide short term foster care when a birth mother was in the process of selecting adoptive parents. T7:132-13 to 19; T7:132-23 to 25; T7:133-1 to 3. Ms. Propert cared for the baby from the time the child was released from the hospital. Ms. Letizia offered to inquire about longer term foster care for the baby. T7: 125-2 to 5. Ms. Letizia found a foster care provider and provided the information to Petitioner. T7:133-23 to 25; T7:134-11 to 13; T7:135-13 to 17; T7:136-3 to 7. Ms. Letizia was in the process of arranging to transfer the baby from Family Options' care and into longer term foster care when she was informed by Ms. Propert that Ms. Propert would continue to care for the baby because of the baby's minor medical problems and because the selection process appeared to be moving forward. T7:144-6 to 25. Neither Petitioner nor her mother objected to allowing Ms. Propert to continue to care for the baby. T7:145-17 to T7:146-2. Petitioner even felt relieved and that it was nice of Ms. Propert to continue to provide care for the baby. T2:151-6 to 19; T2:152-1 to 4.

Petitioner provides no support or citation for her contention that Ms. Letizia's "loyalty" was to the adoptive parents. A fair reading of the record shows that Ms. Letizia normally receives a flat fee if an adoption occurs. T8:232-16 to 25; T8:233-1 to 11; T8:234-5 to 7. In the event that adoptive parents have been selected, and an adoption does not occur, Ms. Letizia receives remuneration based upon an hourly rate, and, in this particular case, earned less by proceeding with the adoption. T10:152-1 to 25; T10:153-1 to 2. Petitioner's insinuation that Ms. Letizia compromised her professional ethics in order to "force" an adoption is unsupported by the facts, inflammatory, and misleading.

Additionally, Petitioner has failed to support her contention that Family Options failed to comply with the Adoption Act by not exercising its discretion to invalidate Petitioner's surrender. Moreover, as the Appellate Division found, "[t]here was no evidence that the child had bonded with [Petitioner] or would suffer harm by the adoption". PA 14a.

Petitioner is inaccurate in her allegation that Family Options contacted her on a relentless and uninvited basis. While Ms. Letizia may have placed telephone calls to Petitioner, Petitioner certainly called Ms. Letizia's beeper number with even greater regularity. Petitioner testified that she paged Ms. Letizia on no less than eleven different days from her home and twice on one of those dates: December 12, 13, 21, 27, 1999, and January 6, 10, 16, 18, 19, 20, 2000. T:124-15 to 25; T12:12-6 to 11. While Petitioner and Ms. Letizia spoke often, it was never an event solely initiated by Ms. Letizia.

Petitioner refers to Ms. Letizia's casenotes in a misleading fashion in an attempt to create a conflict between the credible record and the Trial Court's findings. As Ms. Letizia testified, the casenotes generally contained the date, nature, and a few notations regarding the contact with Petitioner. T7:16-7 to 11. Ms. Letizia testified that not every aspect of the contact was contained therein, so they were not inclusive of every part of the discussion. T7:16-12 to 14. While the casenotes are credible evidence, Petitioner's reliance upon them is inappropriate. The appropriate fashion in which to review the casenotes is that same reinforce the credibility of Ms. Letizia's testimony, since she, at the time of the occurrence, had made over fifty-one pages of notes that greatly enhanced her ability to recall. No other witness enjoyed this benefit. Thus, the casenotes actually support Ms.

Letizia's testimony and the Trial Court's findings of fact.

Petitioner is inaccurate in her allegation that, prior to Petitioner signing the surrender and consent to adoption documents, Family Options informed the adoptive parents that they were going to receive the baby. As the Trial Court found, Ms. Letizia "indicated to the [adoptive parents] that they were the finalists and she thought [Petitioner] would sign the surrender [on January 19, 2000]". PA 66a. However, the adoptive parents were fully aware that Petitioner might change her mind and not sign the documents. PA 66a.

C. PETITIONER'S VOLUNTARY SURRENDER OF HER PARENTAL RIGHTS COMPLIED WITH THE REQUIREMENTS OF THE NEW JERSEY ADOPTION ACT.

New Jersey's Adoption Act requires an approved adoption agency to provide certain information to a birthparent prior to acceptance of executed surrender documents. Pursuant to N.J.S.A. 9:3-41(a), the adoption agency must:

> Inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and the child... and consent by the person to adoption of the child.

Both the Trial Court and Appellate Division found ample credible evidence regarding Petitioner's understanding that signing the surrender documents would mean an irrevocable surrender of her parental rights and an end to her

relationship and contact with her baby, except as permitted by the adoptive parents. PA 74a; PA 10a-11a.

Pursuant to N.J.S.A. 9:3-39.1(b), "[t]he birth parent... shall be offered counseling as to his or her options other than placement of the child for adoption". The statutory requirement of options counseling is expanded upon by the regulations contained in N.J.A.C. 10:121A-5.4(c)(1), which direct the adoption agency to document that the birthparent was:

> 1. Provided at least three face-to-face counseling sessions... and that the birth parents were:
>
> i. Offered counseling that fully explores alternative plans for the child, including... temporary foster care, day dare and care by relatives;...
>
> iii. Prepared along with [the] child, for surrender and separation;
>
> iv. Referred to other community resources when the agency cannot provide needed services...

The New Jersey Supreme Court has reviewed the issue of compliance with the counseling requirements of New Jersey's Adoption Act. In the case of In Re Baby M., 109 N.J. 396, 432, (1988), the New Jersey Supreme Court determined that "the Legislature so carefully circumscribed all aspects of a consent to surrender custody --its form and substance, its manner of execution, and the agency or

agencies to which it may be made -- in order to provide the basis for irrevocability".

Further, the New Jersey Supreme Court found that the legislative purpose of the Act is furthered by the regulations in the Adoption Manual, N.J.A.C. 10:121A, et seq., by increasing the likelihood that a birthparent "fully understand[s] and appreciate[s] the consequences" of voluntarily surrendering parental rights to the child. Baby M. at 423-33. Both the Trial Court and Appellate Division in this case adhered to that rationale. PA 79a-80a; PA 12a.

In an exhaustive Opinion, the Trial Court determined that Petitioner was provided with sufficient counseling to appreciate the options available to her other than adoption and to understand the consequences of choosing adoption. PA 77a-85a. Petitioner and her mother both testified that they understood the permanency of choosing adoption. T6:69-1 to 6; T3:193-12 to 16. The credible evidence supported the Trial Court's findings, and the Appellate Division affirmed. PA 13a-14a.

The Adoption Act does not require licensed agencies to counsel birthmothers on adoption as a "last resort". It does require agencies to counsel birthmothers on the options available other than adoption, counseling which Petitioner received in full from Family Options.

Both Petitioner and her mother were aware that until the surrender and consent to adoption documents were signed, the baby was still legally Petitioner's daughter. Nurse McKnight-Luddy testified that, while in the hospital, Petitioner's mother informed Petitioner and Nurse McKnight-Luddy that nothing was signed and Petitioner did not have to "do anything" she did not want to do. T4:173-13 to 21;

T4:177-19 to 25; T4:178-1 to 19. Petitioner admitted that she was aware at the time of signing that the documents were for surrender and her consent to adoption of the baby. T3:66-8 to 25; T3:132-20 to 22.

Pursuant to the requirements of N.J.A.C. 10:121A-5.4(c)(1), Petitioner received at least three face-to-face counseling sessions in which alternatives to adoption were discussed. On each of the days that Ms. Letizia provided counseling to Petitioner, they discussed options, including foster care, day care, and care by relatives. Ms. Letizia provided Petitioner with two counseling sessions in her home, on December 11, 1999, and January 14. PA 48a-50a; T7:37-1 to T7:50-25; T7:111-8 to 25; T7:112-1 to 18. She provided four counseling sessions for Petitioner at the office of Family Options, on December 27, 1999, and January 15, 16, 19, 2000. PA 52a-53a; PA 57a-60a; PA 63a-66a; T7:69-9 to 14; T7:73-6 to 25; T7:74-1 to 10; T7:124-9 to 23; T7:125-2 to 5; T7:143-12 to 25; T7:162-8 to 23; T7:165-20 to 25. Additionally, Ms. Letizia provided counseling to Petitioner on January 12, 2000, in the hospital, and on January 18, 2000, at a diner, a location chosen by Petitioner. PA 54a-55a; PA 62a; T7:92-2 through T7:95-1 to 4; T7:154-5 to 17. This is in addition to the counseling provided by Ms. Propert, the Director of Family Options.

Additionally, Petitioner was provided with referrals to outside resources when Family Options was unable to provide the resource. Pursuant to N.J.A.C. 10:121A-5.4 et seq., Family Options was not required to contact resources directly on behalf of the Petitioner. The regulation only requires the adoption agency to refer the birthparent to an outside resource, which was the precise course of action taken by Family Options. PA 81a.

Family Options complied with the statutes and regulations governing adoptions in New Jersey by informing and counseling Petitioner so that she had knowledge and understanding of the consequences of signing the surrender documents. She was aware of the alternatives to adoption. She was aware of the finality of adoption. Family Options was in full compliance with the legislative purpose and goals of the Adoption Act. PA 14a; PA 82a-83a.

ARGUMENT

A. THE STANDARDS OF DUE PROCESS ARE NOT APPLICABLE TO THIS CASE BECAUSE THE VOLUNTARINESS OF PETITIONER'S WAIVER OF A FUNDAMENTAL RIGHT WAS NOT THE ISSUE BEFORE THE TRIAL COURT

Petitioner's brief focuses upon the claim that the right to bear and raise one's child is a fundamental right. However, Petitioner incorrectly focuses on cases where a state agency attempts to take away one's fundamental rights, thus giving rise to the due process clause of the Fourteenth Amendment. Petitioner states "The Fourteenth Amendment concept of substantive due process protects the mother's relationship with her child from *unwarranted governmental intrusion*". (emphasis added) PB 19. In this case, there was no unwarranted governmental intrusion since there was no state action or attempt by any state agency to take away Petitioner's right to raise her child. To the contrary, Petitioner voluntarily surrendered her right to raise her child. Accordingly, this case does not involve a question of substantive due process. The Trial Court's focus was not

upon the involuntary termination of Petitioner's rights, but upon whether or not the voluntary surrender of her child was made under duress.

Petitioner cites the case of In the Matter of The Adoption of Children by D., 61 N.J. 89 (1972), in support of the proposition that adoption proceedings involve the termination of the fundamental, constitutionally protected rights of the natural mother of the child, and without which there can be no adoption. While this is a true statement of the law, it must be noted that Petitioner voluntarily terminated her own rights as the natural mother of the child. The case of D. involved an adoption by a stepfather and a non-consenting birth father. That case and its standards are solely applicable to a situation with divorced parents, as the Court stated in its opinion. Accordingly, that holding is inapplicable to the case at bar.

Petitioner cites the case of New Jersey DYFS v. A.W. and R.W., 103 N.J. 591 (1986), for the proposition that the termination of a mother's fundamental interest in her relationship with her child is protected by the due process clause of the Fourteenth Amendment. That case, however, involved an involuntary termination of parental rights that was initiated by DYFS. In that instance, the Court held that the appropriate standard of proof was clear and convincing evidence, citing the Fourteenth Amendment and the need for due process. The Court did not state that this standard applied in an agency adoption or in the case where a birth mother seeks to set aside a surrender based upon a claim of duress. Accordingly, the case of DYFS v. A.W., is not controlling in this matter.

To advance her argument, the Petitioner continues to insist that state action was involved because the adoption

agency is deputized by the state, which would make the adoption agency's conduct state action. The creation of adoption though a licensed agency serves the interests of people unable to conceive children and parents who conceive children, but do not have the ability to raise them. The Legislature authorizes adoption through licensed agencies, but that does not make an adoption agency a state actor. The adoption agency's actions are subject to a review by the Court to examine if the agency complied with the relevant statutes and regulations. In this case, Family Options' actions were examined by the Trial Court and found to be in compliance with the relevant statutes.

A state is not responsible for the actions of a private party unless the law of the state has compelled the action. The Supreme Court "has never held that a State's mere acquiescence in a private action converts that action into that of the State." Flagg Bros., Inc. vs. Brooks, 426 U.S. 149, 164 (1978).

The difference between the cases cited and the instant case is clear. The case at bar did not involve any state process or state official. The state did not force Petitioner to sign the surrender and then deny the Petitioner her Constitutional rights. Petitioner availed herself of the adoption statute and initiated the action to voluntarily surrender her rights. There can be no state action since there was no government agency. Even if the Courts were to imply that the actions of the agency were state action, the process was initiated by Petitioner, not the adoption agency. There was also no deprivation of any right by the adoption agency as it was a voluntary choice of Petitioner to deprive herself of her right to raise her child.

The Petitioner argues that even if the litigation is between private parties, only the judiciary has the power to terminate parental rights. In support of this proposition, the Petitioner cites several cases, (none of which are New Jersey cases), which are easily distinguishable from this case. First, O.A.H. v. R.L.A., 712 S. 2d 4 (Fla. 1998) (improperly cited by Petitioner as G.A.H.) involved a contested adoption proceeding between the stepparent and the natural father, who would not consent. In that particular case, the father was indigent and had a right to appointed counsel, given the state involvement in an involuntary termination of parental rights. In this case, the Trial Court did not make a judicial determination of termination of parental rights and therefore no state action was implicated.

Petitioner also relies upon the case of In re Jay R., 150 Cal.App.3d 251 (1983), which also involved a stepparent adoption where it was alleged that the birth father had neglected his child. The birth father was indigent. The Court ruled that he had a right to counsel. Due process concerns were implicated because the birth father was accused of neglect, and issues of adequate notice and an opportunity to be heard were presented. That case also turned on very specific language contained in the California statutes. The Court held that "due process requires appointment of counsel for indigent noncustodial parents accused of neglect in stepparent adoption proceedings." Id. at 260. That case is more akin to the procedures necessary in an involuntary termination case initiated by the Division of Youth and Family Services since the basis of the action concerns the neglect or abuse of the child. Those facts are strikingly absent in this case. See also In the Matter of K.A.S., 499 N.W. 558 (N.D. 1993).

Petitioner has created a true distortion of the issues before the Trial Court by arguing that the Trial Court had to decide if a constitutional waiver was validly made in order to terminate the mother's rights. The Trial Court did not consider constitutional waivers and termination of the mother's rights. The issue was whether or not the Petitioner's consent to the adoption was the result of duress. "[E]xtravagant characterizations are no substitute for careful analysis." Parham v. J.R., 442 U.S. 584, 614 (1979). This case cannot be compared to an involuntary termination case. Petitioner has confused the issue which was decided at the Trial Court and attempts to use standards that are limited to involuntary termination cases. The two types of proceedings are inherently dissimilar.

The Petitioner further argues that her waiver of her fundamental right to parent her child was not voluntary, informed and knowing. The Trial Court specifically found that the Petitioner knew what she was doing when she signed the surrender document. Additionally, the waiver arguments advanced by the Petitioner apply to different types of actions, particularly when the state is involved, a fact which is absent in the present case.

Petitioner attacks New Jersey's statutory scheme as violative of due process and incorrectly states that the "state's statutory scheme makes a waiver of the mother's right totally irrevocable". The adoption statute does not mention waivers of rights, but states that a "surrender" is deemed irrevocable and yet provides that it may be set aside under certain circumstances. The Legislature certainly contemplated the importance of finality in an adoption.

In support of this ill-conceived position regarding involuntary waivers of rights, Petitioner cites Johnson v.

Zerbst, 304 U.S. 458 (1938), for the proposition that an uninformed or involuntary waiver of a fundamental right and interest is constitutionally deficient. However, Johnson is totally irrelevant and inapplicable to the case at bar. That case dealt with the Sixth Amendment right to counsel. The flaw in Petitioner's argument is that the case at bar does not involve a waiver of a fundamental right, but involves the signing of a voluntary surrender. While the Courts do not presume acquiescence in the loss of fundamental rights, the Court cannot overlook the fact that Petitioner signed a voluntary surrender of her rights to her child. This was done so after counseling and numerous discussions with the adoption agency and family members.

Petitioner argues that "it is incumbent upon the court to insure that no abuses were employed to induce the waiver of rights." PB 22. Although waiver of rights was not the issue, it is clear that the Trial Court made specific findings of fact and was assured that no abuses were employed in the taking of the surrender.

Petitioner incorrectly states that the Trial Court did not consider her attempted revocation as evidence of the involuntary nature of the surrender. PB 22. To the contrary, the Court considered all of the evidence over thirteen days of trial and wrote a fifty-seven (57) page opinion. In the Opinion, the Trial Court also thoroughly analyzed the method in which the surrender was obtained and determined that it was proper. PB 73a-94a. Petitioner argues that the irrevocability of the surrender violates her substantive due process rights. However, as discussed infra, the Petitioner is not entitled to substantive due process in the absence of state action.

Further, the Petitioner argues that rigid time frames imposed upon an unwed mother are unconstitutional. The cases cited in support thereof are taken completely out of context. Clark v. Jeter, 486 U.S. 456 (1988), is a case about the statute of limitations for paternity actions of illegitimate children. The statute was held unconstitutional on equal protection grounds. The concerns inherent in that case do not abide in this case. The time frame referred to was "the period for obtaining support" Id., at 462, not the period within which to invalidate a voluntary surrender of a child. Pickett v. Brown, 462 U.S. 1 (1983) concerned the very same issue.

While it is acknowledged that the Petitioner was faced with a difficult, emotional decision, the Trial Court included this issue in its findings of fact and found that the Petitioner had adequate time and resources to consider her decision. PA 92a-93a.

B. THE TRIAL COURT IMPOSED THE PROPER BURDEN OF ROOF UPON THE PROPER PARTY

At trial, the Court imposed the burden of persuasion upon the birth mother and ruled that she had to prove her case by a preponderance of the evidence. It is this standard that the Petitioner alleges as a violation of due process.

Petitioner disputes the Trial Court's first stated reason for its refusal to utilize a higher burden of proof, i.e., that in voluntary agency adoptions, the existence of documents, regulations, and strict standards make it more difficult to fabricate facts. However, the Trial Court did not solely rely upon the above items. The Trial Court took testimony for thirteen days, thus fulfilling its role as "the diligent and

jealous arbiter of facts" PB 21. Based upon all of the testimony and the documentary evidence submitted, the Court determined that the Petitioner understood what she was doing, was informed of the finality of the surrender, and voluntarily signed it. Evidence that the Petitioner's surrender was uninformed or involuntary is absent from the record.

Despite the review by the Appellate Division of New Jersey, Petitioner continues to argue that Family Options, the adoption agency, was the proponent of the termination and therefore should have been required to prove the basis for the termination. In fact, the proponent of the termination was the Petitioner herself. She signed a surrender to her child and agreed to terminate her parental rights. As the proponent of the original termination, it was her burden to prove that her consent was induced by duress. She was unable to meet this burden.

Nevertheless, the Petitioner argues that "simple justice" requires the agency to bear the burden of proof. PB 22. It is interesting that the Petitioner does not cite to any case or statute to support this proposition. There appears to be no case law at all that requires the agency to sustain the burden of proof when a consent is sought to be set aside by the birth parent. The agency did not take advantage of the Petitioner. The Petitioner sought the aid of the agency in her time of crisis. It was her allegation that she was under duress, thus it was appropriate for her to bear the burden of proof, not as to why her rights should not be terminated, but as to why her surrender should be set aside. Again, the Petitioner misrepresents the issue.

The Petitioner relies upon the case of Santosky v. Kramer, 455 U.S. 745 (1982) for her argument that the Trial Court should have applied a clear and convincing standard.

Santosky was a case involving an involuntary termination of parental rights initiated by the state. The Court held that the proponent of the termination had to prove its case by clear and convincing evidence. Because the state initiated the action, due process standards applied. In this case, the only question was whether or not the voluntary surrender of Petitioner was the result of duress. There was no state agency involved and there was no state action. The facts of the present case are completely dissimilar than Santosky, which is why the Santosky standards were not applied either by the Trial Court or the Appellate Division. In fact, the Trial Court noted the Santosky standard and specifically held that it was inapplicable to this case. PA 37a. Further, the Appellate Division agreed. PA 20a.

Another factor that the Santosky Court relied upon was that state resources often greatly exceed those of the parents whose rights are sought to be terminated in involuntary termination proceedings. This factor is not applicable to the instant case as state resources are not involved. Both Petitioner and Respondents have private counsel and are utilizing adequate resources to pursue the case, obviating the need for a higher standard of proof.

The case at bar was not initiated by the state, but rather by Petitioner herself. She surrendered her parental rights in a voluntary fashion and was not forced to do so by the state or anyone. Since Petitioner brought the action, it is only reasonable that she bear the burden of persuasion.

Despite the obvious inapplicability of Santosky to a case where there is a voluntary surrender to an agency, Petitioner insists that this creates an issue of constitutional significance for this Court to decide. Petitioner also urges that the burden must shift to the agency to prove the voluntary

nature of a surrender. Both of these claims are unsupported by law or fact.

C. NEW JERSEY'S ADOPTION STATUTE IS NOT UNCONSTITUTIONAL

In the state of New Jersey, there is a statutory scheme for adoption which includes adoptions through state-licensed agencies, and the consents of birth parents to the surrender and adoption of their children. The statute specifically provides that the surrender is irrevocable, absent a showing of fraud, duress or misrepresentation. While the statutes provide procedures for termination of parental rights when initiated by the state in neglect or abuse cases, such procedures are inherently different than those employed for agency adoptions.

Petitioner compares the various methods employed by statute to terminate a parent's rights and focuses on notice. In an agency adoption, the New Jersey adoption statute does not require notice of the complaint for adoption to be served upon the birth mother because when she signs the surrender and consent for adoption documents, she waives the right to be served notice of the adoption complaint.

Petitioner also attempts to compare private placement adoptions and licensed agency adoptions. A birthmother in a private placement adoption may not sign a written waiver of her parental rights because none of the safeguards inherent in an agency adoption are present. With an agency adoption, the agency must fulfill all of the aforementioned statutory and regulatory requirements in order to accept a written waiver of parental rights, which is why the surrender is deemed

irrevocable.

New Jersey has achieved a statutory and regulatory scheme for adoption that seeks to ensure and appropriately balance the rights of the child, the birthparents and the adoptive parents. The Petitioner argues that the New Jersey adoption statute which makes the revocation of a waiver irrevocable regardless of the best interests of the child is unconstitutional and violates due process as applied to this case.

Petitioner has argued that since the adoption statute impairs or adversely affects a fundamental li)erty interest, the law is subject to strict scrutiny. The Petitioner cites the case of Zablocki v. Redhail, 434 U.S. 374 (1978), for this proposition. That case concerned the fundamental right to marry, and a statute was invalidated based upon an equal protection argument. Since Petitioner has not alleged any violation of equal protection or that she is a member of a protected class, the statute in question is not subject to strict scrutiny.

In Baby M., the Court examined the statutory scheme of New Jersey's Adoption Act. The Court in Baby M. found that the "Legislature ...carefully, ...consistently, and ...substantially restricted termination of parental rights", for the reasons previously discussed. Baby M. at 429.

The Petitioner further argues that the state can achieve its objective by less intrusive means, such as imposing a period of revocation or judicial review before a surrender is signed. Deference to the Legislature in this regard is certainly appropriate, especially because the statute in question already protects birth mothers by providing a means to set aside a surrender. The Petitioner availed herself of her

statutory right and had the opportunity to prove her case. She was unable to sustain her burden. See William D.A., Sr. v. Shawna Renee A., 1999 N.L. 1188850 (W.Va.) (concurring opinion).

Since the Court in Baby M. has already closely examined the requirements of an agency surrender and found that the requirements for same are stringent and circumscribed, the Petitioner therefore has no basis to attack the statutory scheme. The Trial Court fully examined the validity of the surrender in the context of the statutory requirements and found that same was not the product of duress. The Trial Court's findings were adequately supported by the weight of the evidence. Petitioner's constitutional claims upon the statutory scheme are therefore without merit.

As a further attack on the statutory scheme, Petitioner notes the absence of a best interests analysis. The Petitioner misreads the Trial Court opinion by stating that the best interest of the child is the interest sought to be protected by the irrevocability of the surrender. The Trial Court's statement was that the "adoptive parent's right to finality of the adoption flows from the best interests of the child." PA 36a. Therefore, it is the child's best interests that favor finality of adoption.

Petitioner further misleads this Court with its statement that the lower court stated that "the child's best interest is a competing interest with that of the mother." PB 23. At the Trial Court level, the only mention of the child's best interests was when the Court outlined the exceptions to the general allocation of burden rules, one being public policy. The Court concluded that along with a right to parent, there is also a consideration of the best interests of the child, "embodied in a policy favoring the finality of adoption." The Court then

concluded that policy considerations did not determine the issue. The Court never embarked upon a best interests analysis because it was not required to do so.

The Petitioner argues that the Court had to consider the best interests of the child when making its determination. New Jersey case law dictates a contrary result as that determination is only made once there is a finding that the parental rights are terminated.

Petitioner's reliance upon several cases that involve stepparent adoptions is completely misguided. Specifically, In re Children by D., 61 N.J. 89 (1972), concerned the adoption of a child by a step father, which was objected to by the birth father. The Court specifically distinguished that case from a typical adoption, stating that "[I]t is to be stressed that what we have to say relates principally to a divorced parents situation." Id. at 92. The Court determined that the birth father's rights could only be terminated upon a finding that he willfully and continuously neglected the child or failed to perform the duties of care and support for the child. Id. at 94. The Court specifically emphasized "that the best interests of the child cannot validly ground a judgment of adoption without it first having been determined that the parental rights of the non-consenting parent can and should be terminated." Id. at 95. See also In Re J.J.P., 175 N.J. Super. 420 (1980); In re Children by N.M., 96 N.J. Super. 415 (1967) (stepparent adoption cases).

D. THERE IS NOT A CONFLICT BETWEEN NEW JERSEY AND OTHER STATES CONCERNING THE STANDARD OF PROOF IN NON STATE AGENCY WAIVER CASES

The Petitioner alleges a conflict between New Jersey Courts and three other states concerning the burden of proof when a birth mother voluntarily waives her rights. Interestingly enough, the Petitioner relies upon case law in three other states which imposed a clear and convincing standard when the basis for the termination was a voluntary waiver. The Petitioner fails to state that in all three cases, the birth parent had the burden of persuasion to prove that the surrender was not voluntary. If this Court determined that the clear and convincing standard applied according to those three cases, the Petitioner would still be unable to meet her burden since she was unable to meet a lower burden of proof, i.e., a preponderance of the evidence.

Nevertheless, these cases are instructive to the finding of duress in other jurisdictions and actually further support the opinion of the Trial Court. In the case of William D.A., Sr., v. Shawna Renee A., 1999 N.L. 1188850 (W. Va.), the birth mother alleged that she was subject to the duress of her father-in-law when she signed a consent to adoption. The court had a trial and determined that the birth mother understood all of the words in the consent and that her credibility was low. The Court found that more than "duress of circumstance'' was required to overturn a consent to adoption. The Court also noted that "if we allowed difficulty inherent in a natural parent's circumstances to constitute duress, it would be difficult to see how any adoption based on consent could ever stand." Id. at *4.

The Court also found that the birth mother had the consent form for a period of time before signing it and had an opportunity to obtain independent advice about it. These facts are strikingly similar to those considered by the Trial Court in this case. In a footnote, the Court stated that West Virginia's adoption law requires proof of duress to be established by clear and convincing evidence by *"the person who executed the consent."* (emphasis added). The concurring opinion noted the importance of the finality of adoption. Thus, even if this Court found that case persuasive, the higher burden of proof would be placed upon the Petitioner.

In the case of Meza v. Rodriguez, 305 Ill.App.3d 777 (1999), a birth father attempted to set aside his surrender. The Illinois statute in question is very similar to the New Jersey statute. The Court held that it was the birth father's burden to prove by clear and convincing evidence that the surrender was the result of duress. The birth father argued that the Adoption Act was "unconstitutional because it invaded the judiciary's power to protect and preserve parental rights." The Act was held constitutional "because the judiciary retained the authority to determine the validity of the surrender." Id. at 783. Most notably, the court stated that:

> the Act does not deprive the natural parent of an opportunity to have a court review the voluntariness of the surrender. Indeed, this is precisely what occurred in the instant case. After Meza filed his complaint, he received a full evidentiary hearing and a court determination as to the voluntariness and validity of his surrender." Id. at 791.

Petitioner's argument is similar to Mr. Meza's and fails for the same reasons.

The state of Hawaii also has an adoption statute very similar to New Jersey. In the Matter of a Female Child, 938 P.2d 1184 (HI 1997), the Court specifically distinguished termination cases from agency adoptions.

> Moreover, withdrawal of a consent to adoption differs from situations such as when the state seeks to terminate the parent-child relationship or when a non-parent seeks custody of a child. In those situations, the appropriate inquiry is directed at the natural parent's fitness to parent...In contrast, a natural parent attempting to withdraw a consent to adoption had already given up that right by voluntarily consenting to the adoption in the first instance. Id. at 1186.

That Court also imposed the burden of proof upon the birth mother and found that it was the mother's valid consent which severed her relationship with her child.

The above cases do not mention the Santosky case and Petitioner's attempt to surmise that the Courts were compelled to employ the clear and convincing standard because of Santosky is ridiculous. Accordingly, the cases from other jurisdictions support the Trial Court's decision to place the burden of proof upon the birth mother.

CONCLUSION

Based upon the foregoing, the Court should deny the Petition for Writ of Certiorari.

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